Reg. v. *Darlington School Governors*[5] although that decision was doubted by Lord Hatherley L.C. in *Dean* v. *Bennett*,[6] and distinguished on narrow grounds in *Willis* v. *Childe*.[7] I fully accept that where an office is simply held at pleasure the person having power of dismissal cannot be bound to disclose his reason. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him. But if he is not bound to disclose his reason and does not do so, then, if the court cannot require him to do so, it cannot determine whether it would be fair to hear the officer's case before taking action."

Now, the relevant portion of Article 311 of the Indian Constitution runs as follows —

"311. *Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State*

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry;

Provided that this clause shall not apply —

(a) ....
(b) ....
(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

In India the position of a civil employee in the light of proviso (c) to Article 311(2) is as summarised by the learned author in "Disciplinary Action against Government Servants and its Remedies, 3rd. ed." — D. K. Srivastava, page 62 —

"As a result of proviso (c) to Article 311(2) and Article 310 of the Constitution, the President is now free to remove or dismiss a person holding a civil service under the Union at his pleasure and can even deprive him of the guarantee embodied in clause (2) of Article 311 in respect of the opportunity to defend himself against such dismissal or removal provided the President is satisfied that in the interest of the security of the State it is not expedient to give that person such an opportunity."

Although there is no provision similar to proviso (c) of Article 311 in our Constitution, it is however clear that under our Constitution every person who is a member of any of the services mentioned in paragraphs (a) to (f) of Article 132(1) holds office during the pleasure of the Yang diPertuan Agung. Hence a law made during the Emergency for purposes of protecting the interest of the security of the country passed under the Emergency (Essential Powers) Ordinance although the effect may be to deprive an officer of the guarantee embodied under Article 135(2) so long as the dismissal is made by the appropriate Commission empowered under the Constitution, even though no enquiry is held, is perfectly valid and effective.

In my judgment the claim must necessarily fail. I therefore dismiss the claim with costs.

Claim dismissed

Solicitors: *Lovelace & Hastings.*

NATIONAL INSURANCE CO. LTD. v. S. JOSEPH

[O.C.J. (Yong J.) October 1, 1973]
[Kuala Lumpur — Civil Suit No. 1463 of 1969]

Insurance — Contract uberrimae fidei — Non-disclosure of material facts — Right of insurer to have policy declared void — Agent of insurance company filling proposal form — Agent not acting within scope of his authority — Insurance Act, 1963, s. 16(4).

In this case the plaintiffs applied for an order to declare void a policy of insurance granted to the defendant in respect of his motor car on the ground of his misrepresentation and non-disclosure of material facts. It was alleged that in answer to questions in the proposal form the defendant had stated that no company had cancelled his policy of insurance in respect of any motor vehicle controlled or owned by him and that he had not met with any accident whilst driving when in fact the defendant had taken out a policy of insurance which had been cancelled as a result of a motor accident involving his car.

Held: (1) since the defendant had declared in his proposal form that the particulars given were true, it was his duty to see and to ensure that the answers were correctly inserted before he signed it. By signing it he would be taken to have read and adopted them;

(2) an agent of an insurance company who fills up a proposal form and completes it with false and untrue particulars for the purpose of getting the policy of insurance for the applicant and a commission for himself, is not acting within the scope of his authority and in so doing is not acting as the agent of the insurance company;

(3) on the facts, the defendant had not disclosed to the plaintiffs or their agent that he had a policy of insurance which had been cancelled nor did he disclose to them that he has had a motor accident. The plaintiffs were therefore entitled to an order declaring the policy of insurance void.

Cases referred to:-

(1) *Biggar* v. *Rock Life Assurance Co.* [1902] 1 K.B. 516, 524.
(2) *New York Life Insurance Co.* v. *Fletcher* 117 U.S. 519.
(3) *Bawden* v. *London, Edinburgh and Glasgow Insurance Co.* [1892] 2 Q.B. 534.
(4) *Newsholme Brothers* v. *Rock Transport and General Insurance Co.* [1929] 2 K.B. 356, 364 and 375.
(5) *Levy* v. *Scottish Employers' Insurance Co.* 17 Times L.R. 229.
(6) *M'Millan* v. *Accident Insurance Co.* [1907] S.C. 484.
(7) *Life and Health Assurance Association* v. *Yale* (1904) 6 F. 437.
(8) *Taylor* v. *Yorkshire Insurance Co.* [1913] 2 I.R. 1.
(9) *Carter* v. *Boehm* (1766) 3 Barr. 1905, 1909.
(10) *Rozanes* v. *Bowen* (1928) 32 Ll.L. Rep. 98 (102).
(11) *Brownlie* v. *Campbell & Others* (1880) 5 App. Cas. 925, 954.

CIVIL SUIT.

R. K. Nathan for the plaintiffs.
David Ng Kim Seng for the defendant.

Yong J.: In this case the plaintiffs ask for an order to declare void the policy of insurance granted by them to the defendant in respect of defendant's car BL 9065 on the ground of his misrepresentation and non-disclosure of material facts. In the proposal form there were a number of questions which the defendant had to answer before plaintiffs would consider the defendant's application for insurance. In paragraph 5 of the proposal form the defendant was asked whether any company had cancelled his policy of insurance in respect of any motor vehicle controlled or owned by him. In paragraph 6, he was asked whether he had at any time met with an accident whilst driving, whether he had made any claim, and whether he was

"now" or had ever been insured in respect of any motor vehicle. To each of these questions the defendant's answer was "no."

On the evidence before me I found that the defendant contrary to his answers had in fact taken out a policy of insurance on his car with the New India Assurance Co. Ltd. and his policy was cancelled by them on January 4, 1966 as a result of a motor accident on December 12, 1965 involving his car.

Within 22 days after the cancellation and within 45 days after the accident the defendant on January 26, 1966 applied to the plaintiffs for insurance. When he applied for such insurance these incidents were therefore still fresh in his mind. If he did give the negative answers as shown in his proposal form he must have known that they were false and untrue.

At the hearing of the suit the defendant did not give evidence and called no witnesses. In his written statement of defence, and in his counsel's address to court the defendant claimed that he had informed the plaintiffs' agent, of the policy of insurance issued by the New India Assurance Co. Ltd., and its subsequent cancellation by them. Defendant also alleged that plaintiffs' agent had obtained his signature on the proposal form without the particulars being filled in. There was not an iota of evidence to substantiate any of these allegations. Since they have been raised I will briefly deal with them.

If these allegations were true, the insurance agent must have invented the false and untrue answers. In so doing was he acting within the scope of his authority as agent of the plaintiffs and are the plaintiffs entitled to avoid the policy of insurance?

In my view if a person applying for insurance, signs a proposal form in blank and leaves it to the agent of the insurance company to complete it on his behalf after having given him certain information, and the agent completes it with false and untrue material particulars for the purpose of getting a policy of insurance for the applicant and a commission for himself in fraud of his principal, the agent is not acting within the scope of his authority and in so doing he is not actng as agent of the insurance company and the latter with no knowledge of such fraud is entitled to avoid the policy of insurance.

I am fortified in this view by the judgment of Wright J. in *Biggar* v. *Rock Life Assurance Co.*[1] where His Lordship said: —

"But, further, it seems to me that here, as in the case of *New York Life Insurance Co.* v. *Fletcher*,[2] it would be wrong to treat Cooper, the company's agent, as their agent to suggest the answers which Biggar was to give to the questions in the proposal. Cooper was an agent to receive proposals for the company. He may have been an agent, as Lindley and Kay L.JJ. put it in *Bawden* v. *London Edinburgh and Glasgow Insurance Co.*,[3] to put the answers in form; but I cannot imagine that the agent of the insurance company can be treated as their agent to invent the answers to the questions in the proposal form. For that purpose, it seems to me, if he is allowed by the proposer to invent the answers and to send them in as the answers of the proposer, that the agent is the agent, not of the insurance company, but of the proposer. I cannot put the doctrine better than in the language of the Supreme Court in *New York Life Insurance Co.* v. *Fletcher* at pp. 532-533 of the case referred to, where they are citing from and adopting previous decisions of the Supreme Court. They say (speaking of another case):— 'The application was signed without being read. It was held that the company was not bound by the policy; that the power of the agent would not be extended to an act done by him in fraud of the company and for the benefit of the insured, especially where it was in the power of the assured by reasonable diligence to defeat the fraudulent intent; that the signing of the application without reading it or hearing it read was inexcusable negligence; and that a party is bound to know what he signs.' Then, speaking of the agent's conduct, they say: 'His conduct in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself or third persons and against his principal, there is no agency in respect to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal... The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential.' Then they go on: 'She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only in good faith answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud, and the insurer has not.'

That doctrine of the Supreme Court of the United States seems to me to be good sense and good law. Even if those doctrines are not to be applied to their full extent, still I cannot conceive how this policy can be held to be binding on the company. The very basis of the policy is the statements in the proposal. These statements are false in several material respects. How, then, can the policy be binding on the company?".

Similar principles were expressed by Scrutton L.J. in the Court of Appeal case of *Newsholme Brothers* v. *Rock Transport & General Insurance Co.*[4] where his Lordship said: —

"The arbitrator finds that the answers were in the handwriting of Willey, the insurance agent, and that Newsholme (proposer) apparently left the matter entirely in the hands of Willey. He finds that Willey was told the true facts by Newsholme, and that the reason for his not writing down the true facts did not appear. It must be either (1) that he unintentionally wrote untruths, because (a) he did not understand Newsholme's communication to him, or (b) forgot what he was told, or (c) did not understand the questions asked; or (2) that he intentionally wrote down untrue facts to earn his commission. Whichever alternative is the truth, Willey was writing the answers as the amanuensis of Newsholme, whose answers they were to be; and after Willey had written the answers, Newsholme signed the proposal, and must be taken to have promised the truth of what he signed. I do not understand how in receiving the information as to the answers and in writing those answers, Willey can be taken to be anything else than the agent of the person whose answers they are to be, and he must be taken to have written them and promised they were true."

And after reviewing various cases including the *Biggar's* case,[1] *Levy* v. *Scottish Employers' Insurance Co.*,[5] *M'Millan's* case,[6] *Yule's* case,[7] *Bawden's case*[3] and *Taylor* v. *Yorkshire Insurance Co.*,[8] his Lordship came to the conclusion that: —

"In my view the decision in *Bawden's* case[3] is not applicable to a case where the agent himself, at the request of the proposer, fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue, and he (agent) knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge

which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

In the instant case the defendant in the proposal form declared that the particulars given by him were true and that he agreed that "the proposal shall be the basis of the contract" between him and the National Insurance Co. Ltd.

On the top left hand corner of this proposal form was a warning prominently printed in red in the following words: —

"Statement pursuant to section 16(4) of the Insurance Act 1963.

'You are to disclose in this proposal form fully and faithfully, all the facts which you know or ought to know, otherwise the policy issued hereunder may be void'."

Section 16(4) of the Insurance Act 1963 reads: — "No Malaysian insurer shall use in Malaysia a form of proposal which does not have prominently displayed therein a warning that if a proposer does not fully and faithfully give the facts as he knows them or ought to know them, he may receive nothing from the policy."

Since the defendant has declared in his proposal form that the particulars given are true, it is his duty to see and to ensure that his answers are correctly inserted before he signs it. By signing it he would be taken to have read and adopted them.

On the evidence before me I found as a fact that the defendant did not disclose to the plaintiffs or their agent that his policy of insurance with the New India Assurance Co. Ltd. had been cancelled, nor did he disclose to them that he has had a motor accident. On the evidence I came to the irresistable conclusion that he had deliberately suppressed and misrepresented these material facts.

I am of the opinion that a contract of insurance is a contract of utmost good faith. Any suppression or non-disclosure of material facts by the proposer will entitle the insurance company to avoid the contract. A fact is material if it would influence the judgment of a prudent or reasonable insurer in fixing the premium or in determining whether he will or will not take the risk. Lord Mansfield as long ago as 1766 said in *Carter* v. *Boehm*[9] that: —

"Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement....

The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary."

In *Rozanes* v. *Bowen*[10] Lord Justice Scrutton said: —

"It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy, that, as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith — *uberrima fides.*"

In *Brownlie* v. *Campbell*[11] Lord Blackburn said: —

"In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides*, that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy...."

Under the circumstances of this case I therefore hold that plaintiffs are entitled to an order declaring the policy of insurance granted by them to the defendant void. Plaintiffs shall have the costs of the suit to be taxed by the proper officer of the court.

Application granted.

Solicitors: *R. K. Nathan & Co.; David Ng Kim Seng & Co.*

SENG GUAN CO. v. LIM CHOON KEOK & ORS.

[A.C.J. (Gill F.J.) October 14, 1973]
[Muar — Civil Appeal No. 2 of 1973]

Workmen's Compensation — Whether accident arose out of and in the course of employment — Workman drowned after collecting tools from sampan in river to go back to factory to repair machine which was out of order — Workmen's Compensation Ordinance, 1952, ss. 27 and 39(2).

This was an appeal from the decision of the President, Sessions Court, Muar, sitting as arbitrator under the Workmen's Compensation Ordinance. The facts were that the deceased was a foreman and chief engine driver employed by the appellants in their factory. On the day in question after he finished his shift duty and had gone home he was recalled to the factory to repair a machine which was out of order. On his way to the factory, the deceased went to a sampan in the Muar river to collect his basket of tools and while coming out of the sampan he fell into the river and was drowned. The respondents, the wife and children of the deceased, applied for workmen's compensation. The arbitrator held that the accident arose out of and in the course of the deceased's employment and he awarded to the defendants a sum of $7,200 as compensation. The appellants appealed.

Held: the learned arbitrator had rightly decided that the deceased died of an accident arising out of and in the course of his employment and the appeal must be dismissed.

Cases referred to:-

(1) *Kuppusamy* v. *Golden Hope Rubber Estate Ltd.* [1965] 1 M.L.J. 178.

(2) *Blee* v. *London and North Eastern Railway Company* [1937] 4 All E.R. 270.

(3) *Harris* v. *Associated Portland Cement Manufacturers Ltd.* [1938] 4 All E.R. 831, 832.

(4) *Thomas* v. *Pentremawar Colliery Company Ltd.* (1927) 136 L.T. 208.